

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1392 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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SIDDIQUE VALIBHAI PATEL

Versus

PRINCIPAL SECRETARY

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Appearance:

MR MC KAPADIA for Petitioner

MR KC SHAH, A.G.P., for Respondent No. 1,2 & 4

MR SUNIL PATEL, Counsel for Respondent No.3

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 20/08/96

ORAL JUDGEMENT

1. The petitioner has brought under challenge the impugned detention order dated 20th January 1996 passed by the Principal Secretary to the Government, Home Department, against Ahmed Vali Patel, brother of the petitioner, under Section 3(1) of the Conservation of Foreign Exhcnage and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as the "COFEPOSA".

2. The grounds of detention of even date indicate that the detenu arrived at the International Airport, Ahmedabad from Muscat by Indian Airlines Flight No.IC 886/8/3/1996. After collecting the baggage the detenu approached the Custom Officer in Red Channel for clearance of his baggage. He declared certain articles set out in the first part of the grounds. However, as the declaration was found to be not satisfactory the detenu's baggage was subjected to scrutiny under the screening machine which displayed some dark patches on the monitor of the screening machine. This led to a detailed examination of the baggage in presence of panchas. As a result of such examination one winersat brand computer synthesised satellite receiver and 7 gold biscuits of 10 tolas each having foreign marks were found from detenu's polythene carry bag. On personal search 5 more gold biscuits of 10 tolas each of foreign mark were recovered. These 12 gold biscuits weighed 1.4 kg. and valud at Rs.6,44,000/-. The Satelite Receiver valued at Rs.6,000/-. These articles were not declared by the detenu and were placed under seizure by the custom officers under the reasonable belief that the same were smuggled articles and were liable for confiscation under the provisions of the Customs Act, 1962.

3. The detenu's statement was recorded under Sections 108 of the Customs Act on 8.3.1996 and according to this statement the detenu had gone to Muscat in 1982, opened a shop for tailoring work, started trading in ready-made garments from 1985, came to India for short visit 5 to 6 times, disposed of his shop at Muscat for 6,500 Omani Riyals, purchased 12 gold biscuits for him and knowing that the custom duty would be payable in convertible currency and having had no intention to pay the same the detenu did not bring required foreign currency with him and did not declare the gold to the Customs officers.

4. It has further been stated in the ground that the detenu was arrested on 8.3.1995, produced before the Additional Chief Metropolitan Magistrate, Ahmedabad, who sent him to judicial custody rejecting the detenu's bail application on 14.3.1995. The detenu thereupon filed Misc.Criminal Application in this court for his release on bail and this Court granted application on 1.5.1995 on certain conditions. The detenu accordingly stood released on bail. The detenu had retracted from his earlier confessional statement in his bail application while making certain allegations against the custom officers. Considering the facts and circumstances the

Detaining Authority felt satisfied that the allegations and the retractios were after-thought and found that the detenu had smuggled gold into India from Muscut. Raising the inference that detenu would continue his prejudicial activities in case his movements are free, the detaining Authority found that there was sufficient cause to pass detention order in question with a view to preventing the petitioner from smuggling goods.

5. The petitioner has challenged the impugned order of detention on number of grounds, inter alia, on the ground that the detenu's representation has not been considered by the Central Government as also on the ground that there was an inordinate delay in passing the impugned order of detention. Since the detenu would succeed on the ground of non-consideration of representation by the Central Government it would not be necessary to deal with all other grounds including the ground of delay against the impugned order of detention.

6. The grounds regarding non-consideration of detenu's representation may be reproduced from Para : 12(A). The same reads as under :

"The petitioner submits that the detenu had made a representation dated 27.2.96 addressed to the Advisory Board. Said Representation was submitted to the Jail Authorities on or about 1.3.96 by the brother of the detenu i.e. the petitioner herein. By way of forwarding letter, the petitioner had requested the Jail Authorities to copy out the said representation and send the same to all the authorities competent to release the detenu. Copy of the said representation along with the forwarding letter are annexed hereto and marked as Annexure : "C" colly. However, said representation was not forwarded to the Central Governmeent by the Jail Authorities which has in turn affected right of the detenu to have his representation considered by the Central Govt. and, therefore, continued detention of the detenu is rendered illegal.

In the alternative, it is submitted that even if the said representation was sent to the Central Govt. same is not yet decided or if it is decided, there is long, unreasonable and unexplained delay in considering the same by the Central Govt. and, therefore, this has affected right of the detenu to make effective representation and, therefore, continued

detention of the detenu is rendered illegal."

7. The State Government has said nothing with regard to the aforesaid ground of challenge against the impugned order of detention/continued detention of the detenu. The Central Government has replied the aforesaid ground as under :

"As regards representation dated 27.2.96, it is submitted that it was addressed to the Chairman, Advisory Board and not to the Central Government. Since it was not addressed to the Central Government, it was not felt necessary to consider the same."

8. I have heard the learned Advocate for the petitioner, learned A.G.P. for the State Government and the learned Counsel for the Central Government. The stand of the Central Government is repeated in the submissions made by the learned Counsel for the Central Government. In my opinion such a stand cannot be accepted in view of binding decision of the Honourable Supreme Court in the case of Moosa Husein Sanghar V/s. State of Gujarat & ors., reported in 1993 (1) G.L.H. 923, and Smt. Gracy V/s. State of Kerala & anr., reported in 1991 (1) SCR 421. Smt. Gracy's case has been referred to in Moosa Husein Sanghar's case in Para : 4 & 5 of the citation thereof. The said paras might, therefore, be reproduced :

4. Shri Krishna Rao, in our view, is right in his submission that even though the representation was addressed to the Advisory Board but since it was forwarded to the Advisory Board through the State Government, it was incumbent upon the State government to have considered the said representation and it could not return the same to the appellant without considering it on the ground that it was not addressed to it, but was addressed to the Advisory Board. A Reference, in this context, may be made to the decisions of this Court in Kubic Dariusz V. Union of India & ors., 1990 (1) SCR 98 and Smt. Gracy V. State of Kerala & Anr. 1991 (1) SCR 421. In K. Dariusz v. Union of India (Supra), the representation of the detenu was addresseed to the Chairman, Advisory Board and it was argued on behalf of the Union of India that the said representation need not have been dealt with by the Central Government. Rejecting the said contention, it was held :

"In the instant case though the representation was addressed to the Chairman, Central Advisory Board, the same was forwarded by the Jail authorities and it must be taken to have been a representation to the appropriate Government which was to consider it before placing it before the Advisory Board and the same having not been done Article 22(5) has to be held to have been violated."

5. Similarly in Smt. Gracy v. State of Kerala & Anr. (Supra), the detenu had addressed his representation to the Advisory Board and it was not considered by the Central Government. It was urged on behalf of the Central Government that since the representation was addressed to the Advisory Board and it was not addressed to the Central Government, there was no obligation on the Central Government to consider the same independently. Dealing with the said contention this Court has observed :-

"The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining support the view that so long as there is representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the Constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention."

10. In my opinion the above observation of the Supreme Court would clinch the issue sought to be raised in the aforesaid ground of challenge against the impugned order of detention.

11. Mr. Sunil Patel, learned Counsel for the Central Government has placed reliance upon a decision of the Division Bench of this Court in the case of Noor Mohamed Abdulla Kara V/s. Joint Secretary to Government of India & 3 others, in Special Criminal Application No.1243 of 1991 (Coram : K.J.Vaidya & J.M.Panchal, JJ.), rendered on 23.7.1992. Speaking through the Bench Panchal, J. has dealt with the facts in the case before the said Division Bench. On going through the facts it appears that that was a case of representation which was already

made and considered by all the concerned Authorities and it was found that there was no necessity of considering the second representation which was nothing but repetition of the first representation. In the present case the facts are different. The detenu has made the first representation on 14.2.1996 (Page : 28). On going through the said representation it cannot be said that the communication is a representation. It can at best be said to be a requisition for furnishing copies of certain specified document in order to enable the detenu to make representation. Such representation has been made by the detenu's brother on 27.2.1996 and it is one and only one representation against the impugned detention. Therefore, the decision of the Division Bench in Noor Mohmed's case (Supra) can hardly have an application to the facts of the present case.

12. In above view of the matter the petitioner would succeed on the aforesaid ground of challenge against the impugned order of detention. Hence, none of the other ground would require consideration. In the facts of the case, therefore, following order is passed :

The continued detention of the detenu Ahmed Vali Patel is hereby held to be illegal and is required to be snapped. The same is, therefore, quashed and set aside. The detenu Ahmed Vali Patel is directed to be set at liberty forthwith if not required in any other case. Rule made absolute accordingly.

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